

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

JOSEPH T. O'CONNOR

v.

DEPARTMENT OF THE INTERIOR

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) DOCKET NUMBER
) DC07528211326
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OPINION AND ORDER

The Department of the Interior removed appellant from his position as a GM-15 Supervisory Physical Scientist for his refusal to accept a directed geographic reassignment. On appeal to the Board's Washington Regional Office, the presiding official, after a hearing, found that the agency established a legitimate management reason for the reassignment and that the removal penalty was reasonable. In so doing, the presiding official rejected appellant's claim that the reassignment was ordered in reprisal for appellant's unpopular political and environmental views. He therefore sustained the removal.

Appellant filed a timely petition for review alleging that the presiding official erred in failing to accord proper weight to the evidence in the record, in denying the admission of certain evidence at the hearing, and in denying appellant's post-hearing motion for a subpoena duces tecum.

In raising these errors, he again challenges the bona fides of the reassignment and argues that his removal does not promote the efficiency of the service. The agency responded, contending that the petition does not meet the criteria for review under 5 C.F.R. 1201.115 (1983) and that the decision was correct in its analysis and conclusion.

In Ketterer v. Department of Agriculture, 2 MSPB 459, 462 (1980), we held that, in a removal action based on failure to accept reassignment, the agency must prove the removal will promote the efficiency of the service. The agency may establish a prima facie case in this regard by showing that the reassignment was based on a legitimate management consideration; that the employee was afforded adequate notice of reassignment; and that he refused to accept the reassignment. Id. Appellant has not disputed that he was qualified for the position to which he was reassigned; that the position was important in the agency operations; that he was afforded adequate notice of reassignment; and that he refused to accept it.

The agency's Office of Surface Moving (OSM) had undergone a nationwide reorganization about six months before the reassignment, resulting in the creation of two technical centers, one of which is in Pittsburgh, Pennsylvania. That office had a vacant GM-15 Supervisory Physical Scientist (Chief, Division of Environmental and Economic Analysis)

position, which required the incumbent to be well versed in permit and mine plan review and National Environmental Policy Act (NEPA) compliance matters. Based on a review of the general needs of the Pittsburgh Technical Center, and the strengths, skills, knowledge, and experience of appellant, the agency determined that appellant was well qualified for the position having been "one of a handful of experts in the United States in matters relating to mine plan review." The agency also showed that appellant was given over five weeks' notice and granted an extension of his reporting date to resolve personal difficulties caused by the reassignment. Although appellant had previously informed the agency that he opposed reassignment from his position in Washington, D.C., he nevertheless visited Pittsburgh during the notice period and indicated he was seriously considering accepting reassignment. Therefore, we agree with the presiding official's finding that the agency has established a prima facie case that the reassignment was bona fide and that appellant's removal for failure to accept it promoted the efficiency of the service. Ketterer, supra; see also Bell v. Equal Employment Opportunity Commission, MSPB Docket No. PH07528110583 (June 16, 1983).

Appellant has not presented evidence sufficient to cast doubt on the bona fides of the reassignment. In his petition for review, appellant argues that the agency knew

he would not accept reassignment to Pittsburgh; that his former GM-15 position was "as or more important than ever"; and that he was punished with reassignment because of his political and environmental views. He further contends that in addressing these arguments, the presiding official failed to consider relevant and material evidence in reaching his decision. The record, however, indicates that the presiding official carefully considered appellant's arguments in assessing weight to the testimony of witnesses and in reaching his decision.

Appellant's arguments and characterization of the evidence in his petition for review represent his disagreement with the presiding official's findings of fact, credibility determinations, and interpretations of evidence, but do not establish a misapplication of the proper standard of proof sufficient to warrant a review of the presiding official's findings of fact regarding appellant's retaliation claim. Weaver v. Department of the Navy, 2 MSPB 297, 298-99 (1980); cf. Maxfield v. Department of Transportation, MSPB Docket No. DE07528110038 (June 2, 1982) (where we found that critical determinations made by the presiding official were not supported by the record). We find insufficient basis, on these facts, to support a conclusion that the agency reassigned appellant knowing that he would not accept reassignment or that appellant was reassigned in retaliation

for his unpopular views. See Curran v. Department of the Treasury, 714 F.2d 913 (9th Cir. 1983); Roskos v. United States, 549 F.2d 1386 (Ct. Cl. 1977).

As additional grounds for review, appellant contends that the presiding official made two procedural errors. First, he argues that the presiding official erroneously excluded testimony concerning the continued importance of appellant's former position. The agency concedes the importance of that position, but argues that this does not affect the bona fides of the reassignment. We agree. Accordingly, we find, based on a thorough review of the record, that the exclusion of this testimony does not constitute reversible error. Karapinka v. Department of Energy, 6 MSPB 114, 115-116 (1981).

Next, appellant contends that the presiding official erroneously deprived him of an opportunity to conduct discovery. Specifically, he claims that the denial of his motion for a subpoena duces tecum filed after the hearing closed was improper. The Board's Chief Administrative Law Judge denied the motion, finding insufficient showing that the evidence sought was not discoverable through use of due diligence. He also found an insufficient showing of the document's relevance. We find no basis for concluding that denial constituted reversible error. Id.

Finally, appellant challenges the presiding official's finding that appellant's removal was reasonable and

appropriate under the circumstances. The Board notes that the presiding official carefully considered the relevant factors in making this determination and we find no basis for disturbing his finding. Douglas v. Veterans Administration, 5 MSPB 313, 332 (1981); Weaver, supra. We further agree with his finding that appellant's removal for refusal to accept a legitimate reassignment promotes the efficiency of the service. See Babros v. Department of Agriculture, 3 MSPB 385, 386 (1980).

Accordingly, appellant's petition for review is DENIED for failure to meet the criteria for review set forth at 5 C.F.R. 1201.115.

This is the final order of the Merit Systems Protection Board in this appeal. The initial decision shall become final five (5) days from the date of this order. 5 C.F.R. 1201.113(b).

Appellant is hereby notified of the right under 5 U.S.C. 7703 to seek judicial review of the Board's action by filing a petition for review in the United States Court of Appeals for the Federal Circuit, 717 Madison Place, N.W. Washington, D.C. 10439. The petition for judicial review must be received by the court no later than thirty (30) days after the appellant's receipt of this order.

FOR THE BOARD:

JUL 9 1981

(Date)

Washington, D.C.

Paula A. Latshaw

PAULA A. LATSHAW
ACTING SECRETARY